(AAAR-TEL) :(2022) 58 TLC(GST) 085

ACHAMPET SOLAR PRIVATE LIMITED

IN THE APPELLATE AUTHORITY FOR ADVANCE RULING, TELANGANA

HON`BLE JUSTICE NEETU PRASAD AND B.V. SIVA NAGA KUMARI, MEMBER

AAAR.COM/04/2022 ORDER-IN-APPEAL NO. AAAR/10/2022

Dated - 19-10-2022

Subject - Levy of GST

Under Section 2(31)(b), 9, 15, 7, 2(102)

Case referred to -

Achampet Solar Pvt. Ltd.

JUDGMENT

(Passed under Section 101 (1) of the Telangana Goods and Services Tax Act, 2017)

Preamble

1. In terms of Section 102 of the Telangana Goods and Services Tax Act, 2017 (TGST Act, 2017 or the Act), this Order may be amended by the Appellate authority so as to rectify any error apparent on the face of the record, if such error is noticed by the Appellate authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer or the applicant within a period of six months from the date of the order. Provided that no rectification which has the effect of enhancing the tax liability or reducing the amount of admissible input tax credit shall be made, unless the applicant or the appellant has been given an opportunity of being heard.

2. Under Section 103 (1) of the Act, this advance ruling pronounced by the Appellate Authority under Chapter XVII of the Act shall be binding only

(a) On the applicant who had sought it in respect of any matter referred to in sub-Section (2) of Section 97 for advance ruling;

(b) On the concerned officer or the jurisdictional officer in respect of the applicant.

3. Under Section 103 (2) of the Act, this advance ruling shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed.

4. Under Section 104 (1) of the Act, where the Appellate Authority finds that advance ruling pronounced by it under sub-Section (1) of Section 101 has been obtained by the appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab-initio and thereupon all the provisions of this Act or the rules made thereunder shall apply to the appellant as if such advance ruling has never been made.

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Subject: GST – Appeal filed by M/s. Achampet Solar Private Limited, Hyderabad 8-2-610/68/1,2,3, 5th Floor, Accord Blu, Road No 10, Banjara Hills, Hyderabad, Telangana – 500034. Telangana State under Section 100 (1) of TGST Act, 2017 Against Advance Ruling TSAAR Order No.07/2022 dated 16.02.2022 passed by the Telangana State Authority for Advance Ruling – Order-in- Appeal passed – Regarding.

* * * * *

1. The subject appeal has been filed under **Section 100** (1) of the Telangana Goods and Services Tax Act, 2017 (hereinafter referred to as “TGST Act, 2017” or “the Act”, in short) by M/s. Achampet Solar Private Limited, Hyderabad 8-2-610/68/1,2,3, 5th Floor, Accord Blu, Road No 10, Banjara Hills, Hyderabad, Telangana – 500034, (hereinafter referred in short as ‘the appellant’ or ‘Achampet Solar’). The appellant is not registered under GST has filed an application in FORM GST **ARA-01** under **Section 97**(1) of TGST Act, 2017 read with **Rule 104** of CGST/TGST Rules. The appeal is filed against the Order No.07/2022 dated 16.02.2022 (“impugned order”) passed by the Telangana State Authority for Advance Ruling (Goods and Services Tax) (herein after referred as “Advance Ruling Authority” / “AAR” / “lower Authority”).

Brief Facts:

2. M/s. Achampet Solar Private Limited is engaged in production and distribution of electricity obtained from solar energy. They have engaged M/s. Belectric India (P) Ltd for construction of solar power project. The agreement has clauses for recovery of liquidated damages on (2) counts, one delay in delivering of the contract and the other regarding non-performance of the plant. The applicant is desirous of ascertaining exigibility of liquidated damages to GST on account of delay in commissioning and its time of supply. Hence this application.

Questions raised:

1. Whether liquidated damages recoverable by the applicant from Belectric India on account of delay in commissioning, qualify as a 'supply' under the GST law, thereby attracting the levy of GST?

2. If the answer to Question No. 1 is in the affirmative, what should be the time of supply when liability to pay GST is triggered?

3. Liquidated damages are demanded by the applicant from the contractor due to the delay in commissioning of the project and postponement in the taking over date beyond the milestones fixed for completion of project.

4. When the parties to a contract specify the time for its performance, it is expected that either party will perform his obligation at the stipulated time. But if one of them fails to do so, the question arises what is the effect upon the contract. This scenario is answered by Section 55 of the Indian Contract Act, 1872, which is extracted below:

"Effect of failure to perform at fixed time, in contract in which time is essential-When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.-If it was not the intension of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon-If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so".

A combined reading of the provisions (1) & (3) of Section 55 of the Indian Contract Act, 1872 reveals that a failure to perform the contract at the agreed time renders it voidable at the option of the opposite party and alternatively such party can recover compensation for such loss occasioned by non-performance.

In the case of the applicant, liquidated damages are imposed for covering the loss of revenue and costs borne by a project SPED due to delay according to a formula. Thus liquidated damages are claimed by the applicant from the contractor due to the delay in commissioning of the project and the taking over date by the contractor beyond the milestones fixed for completion of project. These damages are consideration for tolerating an act or a situation arising out of the contractual obligation. The entry in 5(e) of **Schedule II** to the CGST Act classifies this act of forbearance as follows:

5(e): Agreeing to the obligation to refrain from an act, or tolerate an act, or a situation, or to do an act.

5. Further **Section 2(31)(b)** of the CGST Act mentions that consideration in relation to the supply of goods or services or both includes the monetary value of an act of forbearance. Therefore such a toleration of an act or a situation under an agreement constitutes supply of service and the consideration or monetary value of such toleration is exigible to tax.

6. The clause (6) of the co-ordination agreement filed by the applicant specifies different liquidated damages to be paid for different periods of delay on the commissioning. This clause also specifies that the amount shall be paid within (3) days after the actual commissioning date as per the prescribed formula. The formula consists of various periods of delay i.e., delay upto (1) month, delay between (1) month to (3) months and such periods. Therefore the contract itself prescribes the date on which the damage has to be determined and paid. The date on which the liquidated damage is determined as per the formula prescribed in the clause 6 of the contract is the time of supply of service entry in 5(e) of **Schedule II** by the applicant.

The Consideration received for such forbearance is taxable under CGST and SGST @9% each under the chapter head 9997 at serial no. 35 of Notification No.**11/2017**- Central/State tax rate.

7. Lower authority, examined the submissions made by the Appellant and vide the impugned order, the Advance Ruling Authority had given the following Advance Rulings:

Questions	Ruling by AAR
1. Whether liquidated damages recoverable by the applicant from Belectric India on account of delay in commissioning, qualify as a 'supply' under the GST law, thereby attracting the levy of GST?	Yes.
2. If the answer to Question No. 1 is in the affirmative, what should be the time of supply when liability to pay GST is triggered?	The date on which the liquidated damage is determined as per the formula prescribed in the clause 6 of the contract is the time of supply of service entry in 5(e) of **Schedule II** by the applicant.

8. Aggrieved by the above ruling, the present appeal has been file by the appellant on the following grounds:

1. The impugned order is a non-speaking order and is liable to be set aside

1.1. At the outset, the Appellant submits that the Ld. Authority without considering the detailed submissions made by the Appellant has concluded that the liquidated damages recovered by the Appellant is in the form of consideration for tolerating the delay in commissioning of the project concluded and shall attract GST rate of 18%.

1.2. The Appellant wishes to submit that appropriate justification for treating such liquidated damages as taxable under GST has not been provided by the Ld. Authority. Furthermore, the order fails to discuss or touch upon as to why the favourable ruling pronounced by various Courts in similar fact pattern as of the Appellant would not be applicable to the instant case. It is a settle principle of law that where a similar dispute has been resolved in the past, the court is usually bound to follow the reasoning used in the prior decision.

1.3. Thus, the Appellant submits that the order passed is a non-speaking order and therefore, liable to be set aside. In this regard, the Appellant wish to rely on the following decisions:

In **Atul Engineering Udyogvs Commissioner of Central Excise, Kanpur – reported as [2011 (21) STR 85 (Tri - Del)],** the order of Commissioner (Appeal) was assailed as mechanical concurring with adjudicating authority. When there is a bias of above nature, the Tribunal directed to dispose the appeal sending the matter back to the appellate authority below to pass a reasoned and speaking order depicting the matter in controversy, submissions of the appellant, evidence recorded, reasons of decisions and decision to show that his order is not only rendered justice but also seemed to have been done.

In **Aspinwall& Co. Limited vs Commissioner of Central Excise, Mangalore– reported as [2011 (21) STR 257 (Tri Bang)],** a common order was passed disposing nine appeals. Among the nine cases the Tribunal found that in the case 'Hason Haji & Co.,' the adjudicating authority has ordered for recovery of CENVAT credit which according to him was not eligible to the assessee. On a careful scrutiny and perusal of the order, the Tribunal found that the adjudicating authority has not given any reasoning for holding this view and the amount of CENVAT credit availed by him needs to be recovered from him. In the absence of any reasoning and finding, suffice to say that the said order is a non-speaking order. The Tribunal remitted the matter to the adjudicating authority with a direction to consider the assessee's pleas and pass a reasoned order. Needless to say that the adjudicating authority will follow the principles of Natural Justice before coming to a conclusion.

1.4. Based on the above, the Appellant wish to submit that the Ld. Authority did not take into cognizance the facts of the case and submissions made by and, therefore, the order passed by the Ld. Authority is bad in law.

2. Statement containing the Appellant's interpretation of law and/or facts, as the case may be, in respect of the aforesaid question(s)

The position of law and our understanding of the same

2.1. It is important to note various statutory provisions which have a bearing on the questions raised in the present Appeal. The relevant statutory provisions are extracted hereunder for the ready reference of your goodself:

Relevant Provisions of the Central Goods and Services Tax Act, 2017 ('CGST Act') and the Appellant's interpretation of the same

2.2. Under the GST law, all supplies of goods and services should attract GST (unless specifically exempted). **Section 9** of the CGST Act is the charging Section which provides that there shall be a levy of a tax called the Central Goods and Services Tax on all intra-state supplies of goods or services or both on the value determined under **Section 15** of the CGST Act, 2017 at such rates not exceeding twenty percent as may be notified by the Government. As is clear from the aforesaid Section, the key pre-condition for the levy of GST is presence of a 'supply'.

2.3. **Section 7** of the CGST Act, 2017 defines the term 'supply' and the relevant portion of the same is reproduced hereunder as follows for the sake of brevity:

'7. (1) For the purposes of this Act, the expression "supply" includes-

(a) all forms of **supply of goods or services or both** such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether 6or not in the course or furtherance of business;

(c) the activities specified in **Schedule I**, made or agreed to made without a consideration; and

(d) the activities to be treated as supply of goods or supply of services as referred to **Schedule II**.

……..”

(emphasis supplied)

2.4. Clause (d) above is deleted and new **Section 7(1A)** (extracted below) is inserted effective 1 February 2019:

‘where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in **Schedule II**.’

2.5. **Section 7** of the CGST Act, 2017 defines the term ‘supply’ to include all forms of supply of goods or services or both. On a combined reading of the above provisions, it can be inferred that, by way of deletion of clause (d) and insertion of clause (1A) in **section 7** of the CGST Act retrospectively, activities or transactions specified in **Schedule II** would constitute as supply of goods or services, only when such activity or transaction would qualify as a supply. Accordingly, for applicability of GST, the transaction has to first pass the test of supply.

2.6. Clause 5 of **Schedule II** provides for the list of activities that shall be treated as supply of services. Inter alia, Clause 5(e) provides that agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to an act shall be treated as a supply of services. The relevant portion of the **Schedule II** is extracted hereunder for your ready reference:

SCHEDULE II

(Section 7)

‘5. Supply of services

The following shall be treated as supply of services, namely: -

(a)…….

……

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and….’

2.7. Further, the term ‘service’ and ‘consideration’ is defined as follows under Section 2(102) and 2(31) of the CGST Act:

‘services means anything other than goods, money and securities but includes activities relating to the use of money or conversion by cash or by any other mode, from one form, currency or denomination, to another form currency or denomination for which a separate consideration is charged.’

‘consideration in relation to the supply of goods or services or both includes-

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response

to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply’

The contract/agreement does not involve contractual reciprocity

2.8. A plain reading of the aforesaid provisions under GST indicates that for a transaction to qualify as a ‘supply of service’, it is necessary that there is an underlying ‘activity’ performed by one person for another for consideration. Further, in order to qualify as a ‘supply of service’ for a consideration there has to be a service provider and a service recipient who have agreed to perform/ receive specified services. The contract/agreement should involve contractual reciprocity, i.e., to say, an act done without corresponding desire or without reciprocate contractual obligation of the service recipient cannot be considered as an activity for a consideration.

2.9. In the case at hand, the claims of liquidated damages (‘LDs’) are not payable as consideration towards rendition/supply of any goods or services. The claims of LDs stem from occurrence of an event of default, i.e., in the event of delay or not complying with the obligations under the contract, and hence, are merely in the nature of compensation for losses incurred on account of default by the contractor.

2.10. Therefore, under the contracts entered into between the Parties, the LD clauses are not for the purpose of a defined activity for which a consideration is fixed. It is rather for the avoidance of any delay or non-compliance, for which the Appellant is raising the claim of LDs. Hence, the Appellant submits that raising any claim and subsequent receipt of LDs should not qualify as a ‘supply of service’ performed by one person to another for a consideration, and hence, GST should not be payable.

2.11. The Appellant places reliance on the decision of **Hon’ble Bombay High Court in Bai Mamubai Trust vs Suchitra WD/O. Sadhu KoragaShetty reported as [2019-VIL-454-BOM],** wherein it has been held that payment of royalty as compensation for unauthorized occupation of premises is to remedy the violation of a legal right, and not as payment of consideration for a supply. In absence of reciprocal enforceable obligations, it is incorrect to characterise the payment of royalty as damages to be treated as a ‘supply’ for ‘consideration’ on which GST is payable. Relevant extracts from the judgment have been reproduced below:

“..

57. However, where no reciprocal relationship exists, and the plaintiff alleges violation of a legal right and seeks damages or compensation from a Court to make good the said violation (in closest possible monetary terms) it cannot be said that a 'supply' has taken place.

58. The Learned Amicus Curiae correctly submits that enforceable reciprocal obligations are essential to a supply. The supply doctrine does not contemplate or encompass a wrongful unilateral act or any resulting payment of damages. For example, in a money suit where the plaintiff seeks a money decree for unpaid consideration for letting out the premises to the defendant, the reciprocity of the enforceable obligations is present. The plaintiff in such a situation has permitted the defendant to occupy the premises for consideration which is not paid. The monies are payable as consideration towards an earlier taxable supply. However, in a suit, where the cause of action involves illegal occupation of immovable property or trespass (either by a party who was never authorised to occupy the premises or by a party whose authorization to occupy the premises is determined) the plaintiff’s claim is one in damages.

59. McGregor on Damages defines 'Damages' 'quite simply as an award in money for a civil wrong'. (Paragraph 1-001, McGregor on Damages, 19th Edition (2014).) The commentary goes on to state that:

'[…] Therefore, the preliminary question to be answered, before any issue of damages can arise, is whether a wrong has been committed.' (Paragraph 1-018, McGregor on Damages, 19th Edition (2014).)

60. Damages may arise in an action in tort, or one in breach of contract as they both entail civil wrongs. Damages represent the compensation or restitution for the loss caused to the plaintiff for the violation of a legal right. It may even be the closest monetary alternative to a remedy in specific performance. The term 'Damages' may be used to include payments towards contractual obligations which are performed yet unpaid for, but the law of damages is not restricted to ordering that what ought to have been done or ought to have been paid under contract. The law recognizes and awards damages between persons who do not have priority, if there is a violation of a legal right resulting in a civil wrong which must be remedied.

…..

73 I am of the view that although the measure for quantifying a payment of royalty to the Court Receiver may be determined by looking at consideration payable under a contract or arising out of a business relationship, the royalty may still be in the nature of payments towards a potential award of damages or Mesne Profits, and therefore not liable to attract GST for reasons separately stated.

73. I am of the view that although the quantification of royalty towards a claim of damages involves ascertaining the market rent payable with respect to the property alleged to be illegally occupied, the compensation liable to be paid does not acquire the character of consideration so as to make the transaction a supply.

…75…..

As I have already held above, the payment of royalty as compensation for unauthorized occupation of the Suit Premises is to remedy the violation of a legal right, and not as payment of consideration for a supply. The Court Receiver is merely the officer of the court to whom the payment is made.

76. Therefore, in the present case, where the plaintiff has made out a strong prima facie case and the Defendant has not been able to demonstrate any semblance of right to occupy the Suit Premises, it cannot be said that the Defendant's occupation pursuant to an Order of the Court is a contract involving a 'supply' for consideration. In the absence of reciprocal enforceable obligations, it would not be correct to characterise the Defendant's occupation of the Suit Premises against payment of royalty as a 'supply' for 'consideration' on which GST is payable by the Court Receiver.

..”

2.12. Despite the term ‘supply’ and ‘business’ defined in the GST law are inclusive and wide terms, the aforesaid decision emphasises the presence of enforceable reciprocal obligations as an essential requirement for determining whether a transaction is a supply and any amount received is a consideration for a supply. It shall be observed that, a clear distinction is established by the Hon’ble High Court, between the consideration received for letting out the property and the compensatory damages arising on account of unauthorised occupation of the property.

2.13. Further, the Appellant places reliance on the judgment by Allahabad Tribunal in the case of **M/s K.N. Food Industries Pvt Ltd vs The Commissioner of CGST & Central Excise reported as [2020 (1) TMI 6 – CESTAT Allahabad],** wherein the Hon’ble High Court held that the amount recovered as compensation for damages owing to delay/breach of contract arise from uncertain or unintended events and does not emanate an obligation on any party to tolerate an act or situation. The relevant extract from the ruling has been reproduced below:

‘In the instant case, if the delivery of project gets delayed, or any other terms of the contract gests breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owning to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant. As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs. As such the present ex-gratia charges made by the M/s Parle to the appellant were towards making good the damages, losses or injuries arising from “unintended” events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services.’

2.14. Placing reliance on the principles laid down in the aforesaid decisions, the Appellant submits that the liquidated damages recovered from Belectric India is in the nature of damages for violation of timelines provided in the contract defined to cover an uncertain event. The said recovery cannot be treated as consideration for tolerating an act or situation agreed upon through the contract. Further, in absence of reciprocal enforceable obligations, such recovery of liquidated damages should not be characterised as a supply under GST.

The contract/agreement does not involve a service provider and a service recipient to qualify as supply under GST

2.15. Further, the Appellant submits that one of the important aspects of a supply is that there is an underlying ‘activity’ performed by one person for another for consideration i.e. there must be two different persons viz. (i) recipient of supply and (ii) provider of supply.

2.16. In the present case, it is clear that the Appellant is exercising its statutory right of claiming compensatory damages provided under the Indian Contract Act, 1872 which is to protect interests of its own. It is further submitted that a right belonging to self cannot be executed for another person. In so far as exercising of rights is correctly comprehended, it will not be wrong to state that a person can exercise rights for himself only and not for another person.

2.17. Therefore, the claim for compensatory damages (in the form of penalties) being a right of the Appellant which has been exercised by the Appellant at its option and to its own benefits. In the absence of any recipient of supply, it is submitted that there can be no supply and hence, there can be no levy of GST.

The present arrangement cannot be said to be covered under Clause 5 (e) of Schedule II of the CGST Act, 2017

2.18. The Clause 5(e) of **Schedule II** can be divided into following three sub clauses:

(a) Agreeing to the obligation to refrain from an act;

(b) Agreeing to the obligation to tolerate an act or a situation; and

(c) Agreeing to the obligation to do an act.

2.19. It is submitted that the words ‘agreeing to the obligation’ applies to all the three activities. The said situations can be explained by an illustration as follows:

(a) Refrain from an act – Very often, parties enter into a non-compete agreement with each other. For example, in case of sale of a brand name or an on-going concern or dissolution of partnership etc. Say X sells brand name B to Y, X may agree that he will not sell the similar product under any other brand in the market for a specified number of years. X may be paid for refraining from selling similar products for specified number of years. In this case, as per the contract, X specifically refrains himself from acting (selling) the product B. Since agreement to refrain forms the contract between X and Y, refrainment of X will be taxable under this category. The refrainment of X for not selling the similar products benefits Y.

(b) Tolerate an act or a situation - Similarly, a person or institution may agree to tolerate an act of others. It is common knowledge that whenever repairs or major interior work is undertaken in the society, the society frames certain regulations to avoid inconvenience to the members of the society. For example, the society may frame regulations that work is permitted between given hours or material like cement, steel etc. may be carried in the lift only during a particular time, etc. The society also charges the person carrying out the repair for the inconvenience caused to the other members. This, in commercial terms, is known as "hardship amount". In such situations, the members agree to tolerate the act carried out by the other person. Such situation can be taxed under this category.

(c) To do an act – Very often, suppliers enter into an agreement with their purchasers to further sell only their products. For example, we have witnessed that in theatres, cold drinks of a specific brand name / company are only sold. The retailers enter into an agreement with these companies to solely sell the products under the company's brand name and receive some consideration in return. In such scenarios, the retailers agree to act in a particular manner under the contract.

2.20. In the aforesaid situations, it is observed that there is a specific agreement by the service provider to agree to an obligation specified in the contract. However, in the present case, the Appellant does not enter into an agreement with the Contractor specifically to tolerate any situation or act against which a consideration is received. The Appellant recovers liquidated damages from the Contractor on account of delay by the Contractor in delivering the project within the prescribed timelines.

2.21. In striking contrast to the examples cited above, in the present matter, the Appellant's right to recover compensatory damages becomes contingent upon the service provider/suppliers' delay/default. Thus, the impugned recovery arises on the event of failure on part of the service providers/suppliers not meeting the delivery time and does not emanate from an obligation on the part of the Appellant to tolerate an act or situation. The Appellant has suffered damage or loss, which cannot be equated with making a supply of taxable supply under clause 5(e) of **Schedule II** of the CGST Act, 2017.

2.22. Notwithstanding the aforesaid, the Appellant submits that to qualify as a 'supply of services' as envisaged under clause 5(e) of **Schedule II** of the CGST Act, 2017, the following conditions ought to be satisfied:-

Conditions for levy of GST under Clause 5(e) of Schedule II

- There should be agreement between parties **towards discharging a contractual / agreement - linked obligation** by the supplier of service;

- The **obligation** should be to either 'refrain from an act' or **to 'tolerate an act or a situation';**

- The obligation should be discharged **in lieu of certain consideration.**

2.23. Therefore, in order for a transaction to be covered under the said clause, there has to be a concurrence to assume a contractual 'obligation' to tolerate an act. In the absence of such an obligation between the parties, the said clause cannot be invoked.

2.24. In view of the aforesaid, it is imperative to understand the meaning of the term 'obligation'. The GST laws do not provide any definition for the term 'obligation', hence recourse is taken from other legislations/ judicial precedents or dictionary meaning. The same is provided below:

Under Section 2(a) of the Specific Relief Act, 1963, "Obligation includes every duty enforceable by law"
The Andhra Pradesh High Court in case of **Hyderabad Stock Exchange Ltd vs Rangnath Rathi& Co reported as [AIR (1958) AP 43]** has held that 'An obligation is a tie or a bond which constraints a person to do or suffer something'.
As per the Wharton's law lexicon, the term 'Obligation' has been defined as "An act, which binds a person to some performance; or for the performance of a covenant etc."
2.25. Hence, on a perusal of the project and co-ordination agreements and above conditions, in the instant case, the only obligation that flows from the contract, and is enforceable under the contract, is on the Contractor to undertake the activities set out in the contract, such as erection and commissioning of the power plant, land and site development or operation and maintenance of the power plant. There is no other obligation on the Contractor per se apart from the aforesaid activities.

2.26. On the other hand, under the contracts, the Appellant is not under an 'obligation' to tolerate the act of delay or non-compliance by the Contractor and can invoke the provision of termination of the contract or encashment of the bank guarantee, as the case may be. Therefore, the Appellant has a recourse available under the contract, and is under no obligation to tolerate the act of default by the contractor. Further, the claim of LDs is made towards making good the genuine damages, losses or injuries arising from unintended events and does not emanate from tolerating an act or a situation. Imposing the liquidated damages was never the primary purpose for entering into a contract, rather it is just a consequential effect of transactions already undertaken. There is nothing in the contracts that indicates that the intention of the Appellant or the Contractor is to effect a breach of the contract or to earn LDs by virtue of breach of commitment, which is to be tolerated by either of them. On the contrary, LD clauses are incorporated in the contract in order to avoid/ discourage such acts of default and there is no additional benefit given under the main contract of supply of goods/ services, in return for the LDs.

2.27. Further, LDs received for breach of contract should not qualify as 'consideration' under the contract, as LDs are neither 'in respect of' nor 'in response to' any identified supply made by the contractor, as is also explained in the preceding paragraphs. Instead, it is paid to make good the loss/ injury suffered by the Appellant as a result of default/delay in performance of the contract and have no nexus with any identified supply.

2.28. It is submitted that the liquidated damages, in the instant case, cannot be regarded as consideration for any provision of service, as the amount recovered by the Appellant on delay by the Contractor i) are damages for the loss suffered by the Appellant and ii) have no nexus with any identified supply. In this regard, a reference can be made to the explanation to Section 73 of the Indian contract Act, 1872 which states that, in

estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

2.29. There has to be a distinction made between amount payable for breach of contractual terms or delay in performance and something specifically agreed upon for forbearance or tolerance of an act (like a non-compete fees). In the present case, the Appellant has not entered into a contract with Belectric India to tolerate non-performance of contract. The contract is entered for engineering, procurement and commissioning of solar power projects in India and hence the Appellant submits that no separate supply exists in the event of non-performance of contract.

2.30. Additionally, even under the service tax laws, which had identical provisions and requirements, it was settled law that mere flow of money cannot be subject matter of service tax and consideration/money should have 'nexus' with an identified supply of service. It was also equally settled that payment for damages made were not for any provision of service and were instead made to make good the loss suffered. Reliance in this regard can be placed on the following case laws:

In the case of **Cricket Club of India vs Commissioner of Service Tax reported as [(2015) (40) STR 973],** the Hon'ble CESTAT (Mumbai Bench), observed that mere existence of consideration cannot be presumed in every money flow and unless the existence of provision of a service can be established, the question of taxing an attendant monetary transaction will not arise.
In the case of **Mormugao Port Trust vs Commissioner of Customs, Central Excise and Service Tax, Goa reported as [2016 TIOL 2843 CESTAT Mum],** it was observed that unless, it can be established that a specific amount has been agreed upon as a quid pro quo for undertaking any particular activity by a partner, it cannot be assumed that there was a consideration agreed upon for any specific activity so as to constitute a service.
In the case of **Jaipur Jewellery Show vs CCE & ST, Jaipur-I, 2017 reported as [(49) STR 313 (TRI)],** while dealing with service tax liability on cancellation charges in case of booking and subsequently cancelling a booth, it was observed that such cancellation charges are for putting the appellant into inconvenience by initially booking the booths and subsequently cancelled. In such case as no service stand provided by the appellant to their customers and for which purpose no consideration was ever received by them, it was held that the cancellation charges recovered by the appellant cannot be held to be the consideration for providing business exhibition services and hence, would not be liable to service tax.
In the case of **Reliance Life Insurance Company Ltd vs Commissioner of Service Tax, Mumbai-II, Appeal No ST/85584/2015,** demand of service tax was raised on the assessee on collection of surrender or partial withdrawal charges in case a policy holder diluted the policy completely or partially. The revenue was taxing such charges under the category of 'Management of Investment under ULIP services'. It was observed by the Hon'ble Mumbai Tribunal that there cannot be any levy of service on the surrender and partial withdrawal charges collected by assessee as such charges i) cannot be considered as charges towards provision of services of management of an investment, ii) are in the nature of penalty or liquidated damages, which is not a service and hence cannot be made liable for tax.
2.31. Further, a reference may be made to the provisions under the erstwhile Service Tax and negative list regime of taxation.

2.32. Under the negative list regime of Service Tax, all 'services', except specified in negative list or otherwise exempt, attracted service tax. The term 'service' was defined to mean 'any activity carried out by a person for another for consideration and including a declared service'.

2.33. Section 66E of the Finance Act, 1994 contained list of declared services on which Service Tax was leviable. Entry 5(e) of **Schedule II** to the CGST Act has adopted a provision identical to the Section 66E(e) of the Finance Act, 1994 and treats 'agreeing to the obligation to refrain from an act, or tolerating an act, or to do an act' as supply of services. The relevant extract of provision under service tax regime is extracted below:

'The following shall constitute declared services, namely:-

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act''.

2.34. The Education Guide was issued by Central Board of Excise and Customs ('CBEC'), though not binding, it addressed various concerns under the negative list of services regime under service tax law from 1 July 2012. In that context, CBEC provided the following clarifications on payment of penalty or amounts paid as settlement of disputes.

'2.3.1 Would imposition of a fine or a penalty for violation of a provision of law be a consideration for the activity of breaking the law making such activity a 'service'?

No. To be a service an activity has to be carried out for a consideration. Therefore, fines and penalties which are legal consequences of a person's actions are not in the nature of consideration for an activity.

2.3.2 Would the payment in the nature as explained in column A of the table below constitute a consideration for provision of service?

S.No	A	B
	Nature of payment	Whether consideration for service?
1.	Amount received in settlement of dispute	Would depend on the nature of dispute. Per se such amounts are not consideration unless it represents a portion of the consideration for an activity that has been carried out. If the dispute itself pertains to consideration relating to service then it would be a part of consideration.''

2.35. As per the guidance provided in the Education Guide, with the concurrent existence of Section 66E(e), amount received on account of settlement of dispute was held to not be termed as consideration.

2.36. Thus, in absence of any agreement to provide services between the Appellant and the Contractor under the contract, the activity of recovery of liquidated damages for delay should not be construed as a service. The amount payable by the Contractor is not on account of any activity performed by the Appellant, which may be construed as 'refraining from an act'' or 'tolerating an act or situation' and should equally fall within the clarifications provided under Para 2.3.2 of the Education Guide. The amount payable by the Contractor is financially restitutionary in nature to compensate the customer of the initial investment made in the project, and therefore should not be liable to GST.

2.37. Additionally, in the erstwhile law, the taxability on termination of contract has been a subject of debate. Reliance can be placed on the following case laws under the erstwhile service tax regime on the subject of termination/cancellation of contracts as the principles stated therein should continue to hold good at in-principle level on the subject of liquidated damages.

(a) In **M/s Ford India Private Limited vs Commissioner, LTU Chennai [Vide appeal no. ST/196 and 197/2009 dated 23 January 2018],** the Chennai Tribunal observed that consideration received due to termination of contract is not taxable- 'Regarding the tax liability on the consideration received due to termination of the arrangement, we note that no identifiable service can be attributed for such consideration. It is rather a termination of arrangement which itself the original authority held as a service. We note that by terminating the arrangement, the appellants are adversely put to certain business loss. The consideration has been paid for such loss. No identifiable service could be attributed for such payment during the material time. Accordingly, the tax liability on such consideration could not be sustained.

(b) In **Small Industries & Development Bank of India vs CCE, Chandigarh reported as [2011 (23) STR392 (Tri- Del)],** the Delhi Tribunal observed that the foreclosure of loan means ending of loan already given and cannot be treated as rendering any services by financial institution. It was in nature of compensation for possible loss of interest revenue. Foreclosure premium is a kind of compensation for possible loss of interest revenue on the loan amount returned by the customers.

(c) In **Globe Forex& Travel Ltd vs Commissioner of C Ex, Jaipur –I reported as [2015 (37) STR 513 (Tri- Del)]** the Delhi Tribunal observed that cancellation charges collected on cancellation of air ticket were not received by appellant from its clients (i.e., airlines) and hence service tax should not be payable on such charges.

2.38. Further, the Appellant would like to point out that similar provisions of law are prevalent in the statutes governing in other countries like Australia or EU, and therefore, reliance is placed on the following foreign case laws dealing with similar issues:

Section 9-5 of the Australian GST Act sets out the criteria for making a taxable supply. One of the criteria for making such a supply is that "the supply is made for consideration". Further, subsection 9-10(2) provides a non-exhaustive list of activities or occurrences that are included within the meaning of supply. This, inter alia, under clause (g) includes:
"an entry into, or release from an obligation:

(i) to do anything; or

(ii) to refrain from an act; or

(iii) to tolerate an act or situation;"

The Australian Government regularly issues rulings or GSTR (Goods and Services Tax Rulings) clarifying the position of law on various contentious issues. The Australian government has issued GSTR 2001/4 dated 20 June 2001 to clarify the position of law on taxability of liquidated damages. Under said GST Ruling (GSTR) at paragraphs 71 to 73, it has been categorically stated that in case of claims for damages arising out of negligence and causing loss of profits, termination or breach of contract, etc., the aggrieved party will often seek an appropriate compensation or claim for the damage caused.

At Paragraph 73 the GSTR states that:

"This damage, loss or injury, being the substance of the dispute, cannot in itself be characterized as a supply made by the aggrieved party. This is because the damage, loss, or injury, in itself does not constitute a supply under section 9-10 of the GST Act."

Further, in the context of 'service' and taxability of the same, various rulings have been passed wherein it has been held that a service is taxable only if there is a direct link between the service rendered and the consideration received, the sums paid constituting genuine consideration for an identifiable service supplied in the context of a legal relationship in which performance is reciprocal.(Case 102/86 Apple and Pear Development Council [1998] ECR 1443, Case C-16/93 Tolsma [1994] ECR I-743)
Relying on the aforesaid precedents, in the case of Societethermaled'Eugenie-les-Bains reported as [(2007) STI 1866], the question that came up for consideration of the Court of Justice of the European Communities is whether a deposit (taken as advance for booking a room) retained by a hotel in case of cancellation by the clients should be subject to VAT. The Court took into consideration the aforesaid principle and held that payment of a deposit by a client on the one hand, and the obligation of the hotelier on the other hand, not to contract with anyone else in such a way as to

prevent it from honouring its undertaking towards that client cannot be classified as reciprocal performance, as the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit.
Therefore, the Court held that since, on the one hand, the deposit paid does not constitute the fee collected by a hotelier by way of genuine consideration for the supply of an independent and identifiable service to his client and, on the other hand, the retention of that deposit, following the client's cancellation, is intended to offset the consequences of the non-performance of the contract, it must be held that neither the payment of the deposit, nor the retention of that deposit is taxable for VAT purposes.

Similarly, the Court of Appeal (UK) in case of **Vehicle Control Services Limited (2013) EWCA Civ186**, has said that payment in the form of damages/penalty for parking in wrong places/wrong manner is not a consideration for service as the same arises out of breach of contract with the parking manager.
In GSTR 2003-2011, the Australian Taxation Office had to consider the applicability of GST on payments made on an early termination of a lease of goods by a lessor on account of a lessee's default. It is imperative to note that the Australia GST Laws covers 'an obligation to refrain from an act and to tolerate an act or situation' as supply. Further, much like under the Indian law, the Australian GST law required that a supply should be made for consideration and for this requirement to be met, there i) had to be payment/any act or forbearance for consideration and ii) the said payment/any act or forbearance or consideration is 'in connection with', 'in response to' or 'inducement of a supply'.
In the said background, the Australian Tax Office ruled that payments made on early termination of a lease by the lessor does not constitute a supply as the same is nothing but genuine damages for the loss suffered by the lessor. It further held that any payment received to compensate for genuine damage or loss flowing from a default of a party is not a consideration for any supply as it is not made in connection with any supply.

In this regard, reliance may also be placed on EU case law of Financial & General Print Ltd (LON/95/1281A), wherein it was held that the liquidated damages are the compensation for loss of earning and hence are not consideration for supplies and are outside the scope of VAT.
It is however to be noted that the aforesaid ruling is in the context of termination of contract, however, a corollary can be drawn that in case of LDs paid in the event of default by the contractor (whether or not the contract is terminated), no tax should be paid on the same, as termination of the contract is an event which occurs post the event of default and it is well settled in these judgments that any payment made for any default caused by the supplier of service cannot be considered as a separate activity liable to tax.

2.39. The Indian GST law is in its formative stages. There is no jurisprudence on certain expressions employed under the Act and taxability of damages under the indirect tax law, particularly the GST law, is still uncertain and unclear. In such circumstances, recourse ought to be had to international cases and rulings understand the meaning and import of certain expressions.

2.40. The Supreme Court of India and High Courts across the country routinely follow international rulings and commentaries, where there is little or almost no jurisprudence on a given subject, for sufficient guidance. As a result, where the rulings in aforesaid foreign rulings cited by the Appellant shed sufficient light on the taxability of damages in the context of the expression 'tolerate an act', such rulings ought to be taken into consideration before deciding the issue at hand before this Authority considering the fact that the expression examined by the foreign authorities in the decisions relied upon by the Appellant exactly the same as the expression used under the GST law.

2.41. As per the above, it can be inferred that there is no underlying supply against the revoking of LD and hence GST should not be payable.

Mere inclusion of specific clause for payment of damages should not change the nature of transaction to transform a lawful right of termination into an 'obligation to tolerate'

2.42. In Page 2 of the impugned order, Ld. Authority has relied on the provisions of the Indian Contract Act, 1872, to hold that damages are consideration for tolerating an act or situation arising out of a contractual obligation and therefore shall be subject to the levy of GST.

2.43. In this regard, the Appellant submits that while from the provisions of the Indian Contract Act, 1872, it is evident that entitlement to receive compensation for delay in supply of material is a statutory right, it is also important to note that exercising statutory right granted under a statute cannot be termed as a supply under GST.

2.44. It is a business prudence that contracting parties foresee an act of breach by the other party and take measures to safeguard themselves against any consequent loss/ injury arising out of such breach. In this regard, it is a standard practice to include specific clauses in the agreements providing aggrieved party a right to seek damages against loss/ injury. These clauses act as a deterrence against breach of terms by the other party.

2.45. Mere fact that such a clause is included in the contract for protection of the aggrieved party would not result in creation of an obligation to tolerate a breach of the agreement. On the contrary, it gives the aggrieved party a right to sue/ enforce the terms and claim damages.

There cannot be an agreement to tolerate a breach

2.46. The Appellant submits an agreement to tolerate an illegal act is not a valid agreement under the Indian law. Assuming without admitting that the Appellant is tolerating a default by the service recipient in discharging its obligations under the co-ordination agreement, it is submitted that such an agreement to tolerate an illegal act can have no enforceability under law. This being so, the co-ordination agreement entered into by the parties

cannot be construed to cast an obligation on the Appellant to tolerate an illegal act or situation as the same would have the effect of rendering the said agreement unenforceable.

Recovery of liquidated damages by the recipient can be viewed as mere renegotiation of the price of the original contract and not a separate transaction

2.47. It is pertinent to note that the contract law permits that a promisee can claim set off for loss suffered under the provisions of the contract against price payable. Reliance in this regard can be placed on **Devidayal sales P Ltd vs State of Maharashtra reported as[AIR 2006 BOM 307].**

2.48. The Appellant submits that the fact that the tax is payable on the gross amount charged/transaction value and not on the amount inclusive of liquidated damages/penalty is also supported by **Section 34**(1) of the CGST Act. According to **Section 34**(1), where a supplier has issued an invoice, or received any payment against a service to be provided which is not so provided by him either wholly or partially for any reason or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract, the supplier may issue a credit note for the value of the service not so provided to the person to whom such an invoice had been issued. Where a credit note is so issued, the transaction value of a transaction is reduced. Therefore, the obligation is on the part of the supplier/service provider to issue a credit note in terms of **Section 34**(1) of the CGST Act and not on the recipient to pay service tax for penalties recovered.

2.49. In view of the same, the Appellant submits the recovery of liquidated damages by the recipient of the supply can be inferred as a renegotiation of the price of the original contract on account of deficiency in supply undertaken by the supplier and shall not be regarded as a separate supply or transaction attracting GST.

There is a difference between the term 'Condition to a contract' and 'Consideration for a contract'

2.50. The Appellant wishes to submit that ‘conditions’ attached to a contract cannot be seen in the light of ‘consideration’ for the contract as merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.

2.51. In this regard, the Appellant draws reference to a recent ruling by CESTAT New Delhi in the case of **South Eastern Coalfields Ltd. vs Commissioner of Central Excise and Service Tax, Raipur reported as [2020 (12) TMI 912 - CESTAT New Delhi].** In the said ruling, the Tribunal referred to a decision by Supreme Court in Food Corporation of India vs. Surana Commercial co. and Others wherein the Supreme Court pointed out that if a party promises to abstain from doing something, it can be regarded as a consideration, but such abstinence has to be specifically mentioned in the agreement.

2.52. The Tribunal further held that ‘In the present case, the agreements do not specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but as noted above, there is a marked distinction between 'Conditions to a contract' and 'Considerations for a contract’.

2.53. Further, the aforesaid decision was followed by Tribunal in the below rulings, wherein the Hon’ble CESTAT held that it is not possible to sustain the view that since the task was not completed within the time schedule, the appellant agreed to tolerate the same for a consideration in the form of liquidated damages, which would be subjected to service tax under section 66E(e) of the Finance Act.

a. CESTAT Chennai in M**/s Steel Authority of India Ltd. vs Commissioner of GST & Central Excise [2021 (7) TMI 1092 - CESTAT CHENNAI** ‘It is not possible to sustain the view taken by the Commissioner that since the task was not completed within the time schedule, the appellant agreed to tolerate the same for a consideration in the form of liquidated damages’;

b. **M/s Neyveli Lignite Corporation Ltd vs Commissioner of Customs, Central Excise and Service Tax, Chennai with M/s NLC India Ltd vs Commissioner of GST and Central Excise, Trichy reported as[2021 (7) TMI 1090 - CESTAT CHENNAI]** ‘it is not possible to sustain the view taken by the Commissioner that since BHEL did not complete the task within the time / schedule, the appellant agreed to tolerate the same for a consideration in the form of liquidated damages’

c. **MP PoorvaKshetra Vidyut Vitran CoLtd reported as [2021 (2) TMI 821]** – ‘It is not possible to sustain the order passed by the Principal Commissioner confirming the demand of service tax on the amount collected towards liquidated damages’

The recovery of liquidated damages is in the nature of ‘actionable claim’, outside the ambit of GST

2.54. **Schedule III** of the GST Act which deals with activities or transactions that shall be treated as neither supply of goods or services, inter alia, includes

‘6. Actionable claim, other than lottery, betting or gambling’

2.55. Further, the provisions of CGST Act borrows the definition of 'actionable claim' from Section 3 of the Transfer of Property Act, 1881 which provides as under:

'actionable claim means, a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent'

2.56. Thus, basis conjoint reading of the definition and provisions provided with respect to taxability of actionable claim, it can be said that any claim to any debt whether such debt or beneficial interest is existent, accruing, conditional or contingent shall be termed as an actionable claim and shall be outside the ambit of GST.

2.57. In the present case, the Appellant submits that the contract is for engineering, procurement and commissioning of solar power projects in India. Further, the contract at maximum intends to incorporate certain indemnification clauses to make good the losses if any incurred by the Appellant on account of the delay caused by the Contractor.

2.58. In the event of the delay caused by the Contractor, the Appellant has the right to invoke indemnification clauses and the claim of debt undoubtedly accrues in favour of Appellant, when an invoice is raised on the Contractor for indemnification of the losses. Such an indemnification clause in the contract along with the issuance of invoice for recovery of the amount, results in crystallization of a debt which would be due from the Contractor. The Contractor is contractually liable to make the said payment. Under the said circumstances, once a loss occurs and a claim is made for indemnification of such loss by issuance of an invoice, a debt is clearly created, and the said amount would fall within the scope and ambit of an "actionable claim".

2.59. Such a claim would be in the nature of a debt enforceable in law, if the payment was not made by the Contractor to compensate for the loss accruing to Appellant. Consequently, the compensatory payments are a transaction in relation to such 'actionable claims' and therefore cannot be treated as neither supply of goods nor supply of service in terms of **Schedule III**. Reliance in this regard is placed on a judgment, rendered in the context of service tax, by the **Hon'ble Kolkata Tribunal in the case of Amit Metaliks Limited Vs CCE, Bolpur [2019 11 TMI 183 Kolkata Tri]:**

'25. **We also find a considerable force in the contention raised by the learned Advocate that the compensation received by the Appellant from the cultivators and M/s AML, the debt in present and future, which as per Transfer of Property Act** in the category of Actionable Claim placing reliance on the decision of **Hon'ble Supreme Court in case of Kesoram Industries and Sunrise Association(Supra)**

13. A careful reading of the Settlement Agreement in question clearly show that the land owners have agreed to pay a definite sum, that is, an ascertained amount to the Appellant-developer to resolve all claims of settlement. **The settlement agreements have resulted in creation of a debt in favour of the Appellant. Under the said circumstances a debt is clearly created and the said amount would fall within the scope and ambit of an actionable claim within the meaning of Section 3 of the Transfer of Property Act, 1882 and hence excluded from the definition of ' service' as per Section 65B(44).**

14. It is submitted that the amount in question is an 'actionable claim' which is not liable for any service tax under the provisions of the 1994 Act. The meaning, nature and scope of actionable claim has been dealt with in detail by the Constitution Bench of the Hon'ble S**upreme Court of India in case of Sunrise Association vs. Govt. of NCT of Delhi reported in (2006) 5 SCC 603.**

26. Thus, we held that the entire sum of money would be classified as Actionable Claim which otherwise is beyond the scope of service tax under Section 66B(44) (iii) of the Finance Act. If the transaction of Development Agreement, Settlement Agreement and compensation not fall under 'Service' under the Finance Act there is no application of Section 66 E(e) of the Act ibid.'

2.60. Basis the above, it can be said that the claim of liquidated damages by the Appellant from the Contractor is in the nature of actionable claim, outside the ambit of GST.

2.61. Considering the above submissions, the Appellant humbly submits that liquidated damages does not qualify as a supply of service under GST, in view of the following grounds:

There is no contractual reciprocity or concurrence to assume an obligation to refrain from an act or tolerate an act between the Appellant and the Contractor, which are indispensable and essential for a transaction to qualify as a 'supply of service'.
The liquidated damages preferred by the Appellant are not in lieu of any activity / obligation agreed to be performed at the behest of the service recipient, but on account of breach of contract (delay in completion of project timelines).
The Appellant's case does not get covered under Clause 5 (e) of **Schedule II** of the CGST Act, 2017
Mere inclusion of a specific clause for payment of damages should not change the nature of transaction to transform a lawful right into an 'obligation to tolerate'.
Recovery of liquidated damages by the recipient can be viewed as mere renegotiation of the price of the original contract and not a separate transaction.

There is a difference between the term ‘condition to a contract’ and ‘consideration to a contract’ Merely because the service recipient has to fulfil the conditions attached to a contract would not mean that the value would form part of the value of the taxable services that are provided.
The recovery of liquidated damages is in the nature of ‘actionable claim’, outside the ambit of GST.
2.62. It is submitted that, since the transaction would not attract the levy of GST, it is our humble submission that the question regarding the time of supply provision as to when the GST liability shall be triggered does not arise.

Whether the appeal is filed in time:

9. In terms of **Section 100** (2) of the Act, an appeal against Advance Ruling passed by the Advance Ruling Authority, has to be filed within thirty (30) days from the date of communication thereof to the applicant. The impugned Order dated 16.02.2022 was received by the appellant on 16.02.2021 as mentioned in their Appeal Form GST **ARA-02**. They filed the appeal on 17.03.2022, which is within the prescribed time-limit.

Personal Hearing:

10. In terms of **Section 101**(1) of the Act, the appellant was given personal hearing, in virtual mode on 29.04.2022. Shri NirenShetia Chartered Accountant and Authorised Representative appeared for the Appellants. The appellants reiterated their written submissions made along with the application and no additional submissions were made at the time of personal hearing. They requested to set aside the advance ruling in respect of said issue that are being contested and consider their appeal favourably.

Discussions and Findings :

11. The contentions of the Applicant are examined and the observations are made as under:

12. The applicant contended that liquidated damages received towards breach and non compliance cannot be construed as ‘consideration’ for ‘refraining or tolerating an act’. The applicant further contends that claim of liquidated damages by them from contractor does not qualify as a supply of service under GST on following grounds:

There is no contractual reciprocity or concurrence to assume an obligation to refrain from an act or tolerate an act between the applicant and the contractor, which are indispensible and essential for a transaction to qualify as a ‘supply of service’.
The liquidated damages preferred by the applicant are not in lieu of any activity/obligation agreed to be performed at the behest of the service recipient, but on account of breach of contract(delay in compensation of project timelines).
The applicant case does not get covered under clause 5(e) of **Schedule II** of the CGST Act,2017.
Mere inclusion of specific clause for payment of damages should not change the nature of transaction to transform a lawful right into an ‘obligation to tolerate’.
Recovery of liquidated damages by the recipient can be viewed as mere renegotiation of the price of the original contract and not a separate transaction.
There is difference between term ‘condition to a contract’ and consideration to a contract’ merely because the service recipient has to fulfill the conditions attached to the contract would not mean that the value would form part of the value of taxable services that are provided.
The recovery of liquidated damages is in the nature of ‘actionable claim’, outside the ambit of GST.
13. The CBIC has issued Circular No. **178/10/2022-**GSTdated:3.8.2022 related to GST applicability on liquidated damages. As per para 7.1.6 of the said circular, it was, interalia, observed that when principal supply is exempt, the ancillary activities to such principal supply would not get attracted to GST. Since in the present case, the applicant’s principal supply is production and distribution of electricity, which is exempt from payment of GST, the liquidated damages received by the applicant towards such supply need to be considered as flow of money without having implication of GST payment.

14. As per the circular where the amount paid as ‘liquidated damages’ is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to do or abstain from doing anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.

15. The impugned order of the Advance Ruling Authority is therefore set-aside on the above grounds.

ORDER

1. Whether liquidated damages recoverable by the applicant from Bi-electric India on account of delay in commissioning, qualify as a ‘supply’ under the GST law, thereby attracting the levy of GST?	No. The amount recoverable by the applicant in the form of liquidated damages does not qualify as supply, as seen from the agreement.
2. If the answer to Question No. 1 is in the affirmative, what should be the time of supply when liability to pay GST is triggered?	Does not arise

The ruling of the lower authority is set aside and the subject appeal is disposed off accordingly.